No. 10-283

In The
Supreme Court of the United States

DAVID MAXWELL-JOLLY, Director of the California Department of Health Care Services,

Petitioner,

v.

SANTA ROSA MEMORIAL HOSPITAL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
DOUGLAS M. PRESS
Senior Assistant Attorney General
KARIN S. SCHWARTZ
Supervising Deputy Attorney General
GREGORY D. BROWN*
Deputy Attorney General
**Counsel of Record*
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5461
Fax: (415) 703-5480
Gregory.Brown@doj.ca.gov
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

REPLY BRIEF FOR PETITIONER 1

I. The Court Should Review the First Question Presented 2

II. The Court Should Review the Second Question Presented 7

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Alaska Dep't of Health and Soc. Servs. v. Ctrs. for Medicare and Medicaid Servs., 424 F.3d 931 (9th Cir. 2005) 10

Alexander v. Sandoval, 532 U.S. 275 (2001) 4

Ault v. Council of the City of San Rafael, 17 Cal. 2d 415 (1941) 6

BellSouth Telecomm., Inc. v. MCImetro Access Transmission Servs., Inc., 317 F.3d 1270 (11th Cir. 2003) 5

Bio-Medical Applications of NC, Inc. v. Elec. Data Sys. Corp., 412 F.Supp.2d 549 (E.D.N.C. 2006) 5

Burlington United Methodist Family Servs., Inc. v. Athins, 227 F.Supp.2d 593 (S.D.W.Va. 2002) 5

Cal. Hosp. Ass'n v. Maxwell-Jolly, 188 Cal. App. 4th 559 (2010), *petition for review filed* (Cal. Oct. 19, 2010) 7

Cal. Pharmacists Ass'n v. Maxwell-Jolly, 596 F.3d 1098 (9th Cir. 2010), *petition for cert. filed*, 78 U.S.L.W. 3581 (U.S. March 24, 2010) 7, 10

Cort v. Ash, 422 U.S. 66 (1975) 5

Dennis v. Higgins, 498 U.S. 439 (1991) 4

Doe v. Chao, 540 U.S. 614 (2004) 4

TABLE OF AUTHORITIES – Continued

Page

Dominguez v. Schwarzenegger, 596 F.3d 1087 (9th Cir. 2010), *petition for cert. filed sub nom. Maxwell-Jolly v. Cal. Pharmacists Ass'n*, 78 U.S.L.W. 3581 (U.S. March 24, 2010) 8, 9, 10

Evergreen Presbyterian Ministries Inc. v. Hood, 235 F.3d 908 (5th Cir. 2000) 5, 11

Exeter Mem'l Hosp. Ass'n v. Belshe, 145 F.3d 1106 (9th Cir. 1998) 12, 13

Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) 3, 4

Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) 1, 2, 3, 4

Hardt v. Reliance Standard Life Ins. Co., ___ U.S. ___, 130 S. Ct. 2149 (2010) 8

Legal Envtl. Assistance Found., Inc. v. Pegues, 904 F.2d 640 (11th Cir. 1990) 5, 6

Long Term Care Pharmacy Alliance v. Ferguson, 362 F.3d 50 (1st Cir. 2004) 12

Methodist Hosps., Inc. v. Sullivan, 91 F.3d 1026 (7th Cir. 1996) 11

Minn. HomeCare Ass'n, Inc. v. Gomez, 108 F.3d 917 (8th Cir. 1997) 10, 11

Mission Hosp. Reg'l Med. Ctr. v. Shewry, 168 Cal. App. 4th 460 (2008) 7

Orthopaedic Hosp. v. Belshe, 103 F.3d 1491 (9th Cir. 1997) 7, 9, 11

TABLE OF AUTHORITIES – Continued

Page

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 4

People v. Olds, 3 Cal. 167 (1853) 6

Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003) 6

Rite Aid of Pa., Inc. v. Houstoun, 171 F.3d 842 (3d Cir. 1999) 11

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 3, 5

Verizon Md., Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635 (2002) 3, 6

Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990) 4

Wilderness Soc'y v. Kane County, 581 F.3d 1198 (10th Cir. 2009), *reh'g granted*, 595 F.3d 1119 (10th Cir. 2010) 3

Wyeth v. Levine, ___ U.S. ___, 129 S. Ct. 1187 (2009) 2, 9

STATUTES

42 U.S.C. § 1396a(a)(30)(A) ..... *passim*

42 U.S.C. § 1983 6

Cal. Civ. Proc. Code § 1085 ..... 6, 7

CONSTITUTIONAL PROVISIONS

Spending Clause 2, 4, 7

Supremacy Clause ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

H.R. Rep. No. 105-149 (1997).....4

REPLY BRIEF FOR PETITIONER

This petition raises the same questions posed in *Maxwell-Jolly v. Independent Living Center of Southern California (Independent Living)*, No. 09-958, and *Maxwell-Jolly v. California Pharmacists Association (California Pharmacists)*, No. 09-1158: (1) whether private parties may invoke the Supremacy Clause to enforce a Medicaid statute, 42 U.S.C. § 1396a(a)(30)(A), that does not meet the requirements for private enforcement identified in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), and other cases; and (2) whether courts may enjoin state Medicaid reforms based on entirely atextual requirements.

The Court should review these issues, which are important, recurring, national in scope, and the subject of conflicting and erroneous decisions among the circuits. Respondents' arguments in opposition range from insubstantial to specious. The petitions in *Independent Living*, *California Pharmacists*, and this case all present excellent vehicles for review, and the present case presents the full panoply of requirements that the Ninth Circuit has now imposed.

On May 24, 2010, the Court invited the Solicitor General to file a brief expressing the views of the United States in *Independent Living*, and the Court subsequently deconferenced the petition in *California Pharmacists* so that the Solicitor General may consider that case as well. The Court should, at minimum, hold the present case pending the Solicitor General's recommendation.

I. The Court Should Review the First Question Presented

The Court should review whether a private party may invoke the Supremacy Clause to enforce a Spending Clause statute that does not meet the requirements for private enforcement set forth in *Gonzaga*, 536 U.S. at 273, and other cases.

1. The Ninth Circuit's holding that the Supremacy Clause permits an end run around this Court's private-right-of-action jurisprudence is based on a misreading of this Court's precedents and leads to an absurd rule where, as respondents admit, "Congressional intent is not relevant" to determining whether a private right of action exists. Opp. 13. Indeed, under the Ninth Circuit's rule, plaintiffs always have a private right of action to enforce federal statutes *even where Congress specifically intended to preclude such enforcement*. This rule conflicts not only with the *Gonzaga* line of cases requiring Congress to unambiguously create private rights of action, but also with the well established rule that "the purpose of Congress is the ultimate touchstone in every preemption case." *Wyeth v. Levine*, ___ U.S. ___, 129 S. Ct. 1187, 1194 (2009).

2.a. Respondents argue that a Supremacy Clause exception to this Court's private-right-of-action jurisprudence is well established. Opp. 8-11. But this Court has not recognized such an exception; the courts of appeals are in conflict on this issue; and those circuits that have recognized this exception

have done so based on a misreading of this Court's precedents and are in conflict with *Gonzaga*, 536 U.S. at 280-86. Respondents' reliance on *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), is misplaced, as *Shaw* merely held that federal courts have *jurisdiction* over preemption claims, a proposition that DHCS does not dispute. *See id.* at 96 n.14; *see also Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642-43 (2002) (addressing only jurisdiction, and not private rights of action). Neither *Shaw* nor any of the additional cases cited by respondents (all of which predate *Gonzaga*) holds that the Supremacy Clause creates a private right of action that Congress itself did not intend to create. Opp. 9-10.

Justice Kennedy's dissent in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), is not helpful to respondents. Justice Kennedy merely noted that a private party may assert preemption as an immunity defense to state regulation, but did not discuss, much less endorse, the notion that a private party may use the Supremacy Clause as a sword to force the state to spend more money. *Id.* at 118-19. That the "target" of a state regulatory effort may be able to "raise a preemptive defense in the form of a suit for injunctive or declaratory relief . . . does not mean that a third party can bring a freestanding preemption claim to enforce compliance with federal law, as if 'preemption' were a cause of action." *Wilderness Soc'y v. Kane County*, 581 F.3d 1198, 1233 (10th Cir. 2009) (McConnell, J., dissenting), *reh'g granted*, 595 F.3d 1119 (10th Cir. 2010). Moreover, this case,

unlike *Golden State*, involves a Spending Clause provision, and accordingly falls under this Court's Spending Clause decisions, including *Gonzaga* and *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 28 (1981), with the limitations on private enforcement recognized therein.

b. Respondents argue that Congress's intent "is irrelevant because the remedy in the instant case is supplied by the Supremacy Clause." Opp. 11. But "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress," and Congress's intent to create or preclude a private right and remedy "is determinative." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *see also Dennis v. Higgins*, 498 U.S. 439, 450 (1991) (the Supremacy Clause "is 'not a source of any federal rights'"); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990) ("Congress rather than the courts controls the availability of remedies for violations of statutes.").

3. Respondents dispute evidence that Congress intended to preclude private suits challenging Medicaid rates when it repealed the Boren Amendment. Opp. 12-13. But the language in the relevant committee report is not limited to the repeal of Boren, but encompasses "any other provision of [§ 1396a]." H.R. Rep. No. 105-149, at 591 (1997). Contrary to respondents' assertion, *Doe v. Chao* does not hold that this type of legislative history is irrelevant, but only that it must be read in context and weighted appropriately. 540 U.S. 614, 626-27 (2004). Indeed,

numerous courts have cited this legislative history, along with the text and structure of the statute itself, in denying private efforts to enforce § 1396a(a)(30)(A).[1]

4.a. Respondents' efforts to distinguish *Legal Environmental Assistance Foundation, Inc. v. Pegues*, 904 F.2d 640 (11th Cir. 1990), are unavailing. Opp. 15-18. In *Pegues*, as here, a private party invoked the Supremacy Clause as its basis for asserting a private cause of action that had not been created by Congress. The Eleventh Circuit held that the Supremacy Clause does not create an implied cause of action, explaining that Congress creates statutory rights and obligations, and thus also determines "who may enforce them and in what manner." *Pegues*, 904 F.2d at 644. The court specifically cited *Cort v. Ash*, 422 U.S. 66 (1975), as supplying the criteria for determining whether Congress intended to create a private right of action. *Id.* at 644. And it rejected plaintiffs' efforts to misconstrue *Shaw* as doing more than identifying a jurisdictional basis for such claims. *Id.* at 643.

Nor does *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 317

---

[1] *See, e.g.*, *Evergreen Presbyterian Ministries Inc. v. Hood*, 235 F.3d 908, 929 n.26 (5th Cir. 2000), *overruled in part on different grounds, Equal Access for El Paso, Inc. v. Hawkins*, 509 F.3d 697 (5th Cir. 2007); *Bio-Medical Applications of NC, Inc. v. Elec. Data Sys. Corp.*, 412 F.Supp.2d 549, 554-55 (E.D.N.C. 2006); *Burlington United Methodist Family Servs., Inc. v. Atkins*, 227 F.Supp.2d 593, 596 n.3 (S.D.W.Va. 2002).

F.3d 1270 (11th Cir. 2003), overrule (or even mention) *Pegues*. There, the court applied *Verizon* and simply held that there was jurisdiction over plaintiff's claim. *Id.* at 1278-79.

b. Respondents note that this Court has adjudicated claims by private parties asserting preemption without first addressing whether the plaintiffs had a private right of action. Opp. 17-18. But this does not mean (and this Court has not held) that no private right of action is required, or that the Supremacy Clause automatically creates one regardless of congressional intent, but rather that the issue is not jurisdictional and thus may be waived if it is not raised. *See Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 683 (2003) (Thomas, J., concurring) (noting that "[r]espondents have not advanced th[e] argument" that the plaintiffs lacked a private right of action). Indeed, this issue was neither raised nor addressed by the courts in *any* of the cases cited by respondents. Opp. 17-18.

5. Respondents' "vehicle" argument mischaracterizes mandamus law in California. Opp. 30-31. "A mandamus can give no right, ... although it may enforce one." *People v. Olds*, 3 Cal. 167, 175 (1853); *see also Ault v. Council of the City of San Rafael*, 17 Cal. 2d 415, 417 (1941) (mandamus "will be granted only when necessary to protect a substantial *right*") (emphasis added). While some intermediate state court of appeal decisions have allowed enforcement under California Code of Civil Procedure § 1085 of federal statutes that are not enforceable under § 1983, the

California Supreme Court has not reached this issue. Moreover, the cases allowing private enforcement of § 1396a(a)(30)(A) under § 1085 did so based on rights and duties created by the Ninth Circuit in the *Orthopaedic* line of cases that is the subject of this and the other two related petitions for certiorari. *See Cal. Hosp. Ass'n v. Maxwell-Jolly*, 188 Cal. App. 4th 559, 573-78 (2010), *petition for review filed* (Cal. Oct. 19, 2010) (No. S186829) (following the *Orthopaedic* line of cases); *Mission Hosp. Reg'l Med. Ctr. v. Shewry*, 168 Cal. App. 4th 460, 473-74, 479-80 (2008) (same). Finally, § 1085 may be preempted if it is construed to permit private enforcement of § 1396a(a)(30)(A) in contravention of congressional intent.

II. The Court Should Review the Second Question Presented

The Court also should review whether a court may enjoin a state law as "preempted" based on purported requirements in a Spending Clause statute that neither Congress nor any federal agency created.

1. In a series of decisions beginning with *Orthopaedic Hospital v. Belshe*, 103 F.3d 1491 (9th Cir. 1997), the Ninth Circuit first created, and then dramatically expanded, an atextual requirement under § 1396a(a)(30)(A) that States must conduct a particular "study" before making reductions in Medicaid reimbursement rates. In *California Pharmacists*

Association v. Maxwell-Jolly, 596 F.3d 1098 (9th Cir. 2010), *petition for cert. filed*, 78 U.S.L.W. 3581 (U.S. March 24, 2010) (No. 09-1158), and *Dominguez v. Schwarzenegger*, 596 F.3d 1087 (9th Cir. 2010), *petition for cert. filed sub nom. Maxwell-Jolly v. California Pharmacists Association*, 78 U.S.L.W. 3581 (U.S. March 24, 2010) (No. 09-1158), the Ninth Circuit added additional requirements as to *who* must conduct the study; *when* it must be conducted; and *what* the study must say.

In the present case, the Ninth Circuit expanded these requirements even further, robotically mandating a pre-enactment "study" even where (1) such a study would make no sense because the state statute expressly provides that rates are based on each individual hospital's costs, and that DHCS must study those costs, via an audit, prior to determining the hospital's final reimbursement; and (2) both pre- and post-implementation evidence conclusively shows that the rate reductions have not, and will not, negatively impact quality of care or access.

The Ninth Circuit's "study" requirement, and its ever-shifting permutations, are completely untethered from the text of the statute and accordingly "more closely resembl[e] 'invent[ing] a statute rather than interpret[ing] one.'" *Hardt v. Reliance Standard Life Ins. Co.*, ___ U.S. ___, 130 S. Ct. 2149, 2156 (2010). These requirements conflict with the holdings of the First, Third, Fifth, Seventh, and Eighth Circuits regarding § 1396a(a)(30)(A)'s requirements, and further conflict with this Court's precedents requiring

preemption to come from Congress, and not what is, in essence, a judge-made federal common law rule. *See Wyeth*, 129 S. Ct. at 1194-95.

2. Respondents contend that the Ninth Circuit's "study" requirements are not "atextual," but they cannot identify any text that supports them. Opp. 18-20. Section 1396a(a)(30)(A) states only that a "state plan" must provide "methods and procedures" to "assure that payments are consistent with efficiency, economy, and quality of care." 42 U.S.C. § 1396a(a)(30)(A). Nothing in the text or structure of § 1396a(a)(30)(A) requires a "study" or any particular type of "methods and procedures" for achieving these general goals. Indeed, several other "methods and procedures" for setting rates can achieve these goals at least as well as – and likely far better than – any "study," including setting wage rates through collective bargaining with provider unions (as in *Dominguez*), and setting rates based on each individual provider's audited allowable costs (as in this case). By rejecting such methods and requiring a "study" under all circumstances, the Ninth Circuit has created a purely judge-made rule.

Nor does the statutory text require that a "study" be conducted prior to enactment of any rate reductions, as the Ninth Circuit itself recognized when it permitted the rate reductions in *Orthopaedic* to be implemented while the State completed its study. *See Orthopaedic*, 103 F.3d at 1494. Nothing in the text or structure of § 1396a(a)(30)(A) precludes a state from meeting the statute's requirements by, for example,

auditing providers' reported costs at the time of the final "cost report settlement," App. 26, 31, 38; conducting ongoing "informal monitoring" of the effect of its rates, *see Minn. HomeCare Ass'n, Inc. v. Gomez*, 108 F.3d 917, 918 (8th Cir. 1997); or using any other reasonable "methods and procedures."

Respondents make no attempt to defend any of the Ninth Circuit's additional requirements, implicitly conceding that there is no statutory basis for them.

3. CMS has not interpreted § 1396a(a)(30)(A) to require a "study," much less to impose any of the additional atextual requirements that the Ninth Circuit added in *California Pharmacists*, *Dominguez*, and this case. Respondents' reliance on *Alaska Department of Health and Social Services v. Centers for Medicare and Medicaid Services*, 424 F.3d 931 (9th Cir. 2005), is misplaced. In *Alaska*, CMS disapproved a state plan amendment on the substantive ground that the rates were too high, noting that it viewed "the State's insistence that [providers] return to the State 90% of the increased federal payments" as an "implicit acknowledgment" that the existing rates were sufficient. 424 F.3d at 938. CMS did not state or imply that § 1396a(a)(30)(A) requires a "study" or imposes any particular procedural requirements. *Id.* at 937-38.

4. Respondents' argument that the district court "rejected" DHCS's evidence is incorrect and misconstrues the issue presented. Opp. 22-25. This petition

raises pure questions of law concerning the Ninth Circuit's atextual interpretation of § 1396a(a)(30)(A), and neither the district court nor the Ninth Circuit decision turned on any findings of fact. App. 1-4, 9-24.

5. Respondents' assertion that the Ninth Circuit's "study" requirement does not conflict with other circuits is demonstrably false. Opp. 25-28. Indeed, the Ninth Circuit's judicially created requirements conflict with *every other circuit that has considered this issue* – specifically, the First, Third, Fifth, Seventh, and Eighth Circuits. Pet. 24-25.

Respondents' efforts to distinguish these other circuits' decisions are unavailing. The Eighth Circuit's holding that no study is required under § 1396a(a)(30)(A) expressly applies to any "setting or changing [of] payment rates," and does not draw a distinction between rate increases and decreases. *Minn. HomeCare*, 108 F.3d at 918. The Third Circuit specifically discussed and rejected the Ninth Circuit's "study" requirement under *Orthopaedic*, holding that "section 30(A) requires the state to achieve a certain result but does not impose any particular method or process for getting to that result." *Rite Aid of Pa., Inc. v. Houstoun*, 171 F.3d 842, 851 (3d Cir. 1999). Respondents argue that the Fifth and Seventh Circuit decisions concerned only the "equal access" provision of § 1396a(a)(30)(A), but those courts' analyses did not turn on which provision plaintiffs were trying to enforce. *See Evergreen Presbyterian Ministries*, 235 F.3d at 933 n.33 (noting that "studies" are "not required by the language of section 30(A)"); *Methodist*

Hosps., Inc. v. Sullivan, 91 F.3d 1026, 1030 (7th Cir. 1996) ("Nothing in the language of § 1396a(a)(30), or any implementing regulation, requires a state to conduct studies."). And the First Circuit analyzed § 1396a(a)(30)(A) in detail, recognizing that its provisions are "highly general and potentially in tension," and that the statute requires only "state plans" with "'methods and procedures' to achieve these general ends." *Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 58 (1st Cir. 2004).

6.a. Respondents' "vehicle" arguments are unavailing. Opp. 28-31. The interlocutory nature of the preliminary injunction order is no impediment, as the petition presents pure questions of law that are of national importance. The Ninth Circuit's erroneous interpretation of § 1396a(a)(30)(A) is now settled law in that circuit (as evidenced by the court of appeals' unpublished decision in this case, App. 1-4), and California and other States should not have to continue to defend against private challenges to their Medicaid programs for another year or longer when the Ninth Circuit's governing legal principles have been firmly established.

b. Respondents argue that CMS must approve any rate changes before they can be implemented. Opp. 28-29. But the Ninth Circuit did not reach that issue; no statute or regulation requires such preapproval; and it has long been CMS's practice to permit California to implement rate changes while its state plan amendments (SPA) are pending before CMS. Respondents' reliance on *Exeter Memorial*

Hospital Association v. Belshe, 145 F.3d 1106 (9th Cir. 1998), is misplaced, as *Exeter*'s pre-approval requirement was based on the specific language of the now-repealed Boren Amendment. *Id.* at 1107-09.

c. The pending administrative proceedings to review California's proposed SPA further support review. This petition contends, after all, that private parties should not be able to interject the courts into Medicaid ratemaking before CMS has discharged its duties. The CMS letter to which respondents cite confirms the highly technical and in-depth nature of CMS's review – one that no court has the expertise or resources to replicate. DHCS has not "stalled" the approval process, which is "off the clock" by agreement with the agency, but is actively coordinating its responses with the agency. While respondents have opinions regarding the State's compliance with the Medicaid Act, Congress entrusted oversight of California's $40 billion Medicaid program to HHS/CMS, not to respondents.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: November 5, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
DAVID S. CHANEY
Chief Assistant Attorney General
DOUGLAS M. PRESS
Senior Assistant Attorney General
KARIN S. SCHWARTZ
Supervising Deputy Attorney General
GREGORY D. BROWN*
Deputy Attorney General

**Counsel of Record*
Counsel for Petitioner